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In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. CHRISTOPHER GALE, PETITIONER

v.

CHRIS NELSON, ET AL., CO-PARTNERS TRADING UNDER THE TRADE NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNERS OF THE TUG DAUNTLESS #10

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

[illegible]
Solicitor General
Department of Justice, Washington 25, D. C.

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OCTOBER TERM, 1954

No. —

THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. CHRISTOPHER GALE, PETITIONER

v.

CHRIS NIELSON, ET AL., CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNER OF THE TUG DAUNTLESS # 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above cause on February 15, 1954.

OPINIONS BELOW

The opinion of the district court (R. 165-168) is reported at 112 F. Supp. 730. The *per curiam* opinion of the Court of Appeals (R. 185), affirming

on the opinion of the district court, is reported at 209 F. 2d 958. These opinions are not appended to this petition because they are contained in the printed record, nine copies of which are being filed herewith. See Rule 23 (1) (i) of the Rules of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1954 (R. 186). By order dated May 15, 1954, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Reed to and including July 14, 1954 (R. 188).

QUESTIONS PRESENTED

1. Whether the usual "pilotage clause" in a towage contract is properly interpreted as making the tow liable to the owner of the tug for damage to the tug incurred through the negligence of the tug owner's own employee in the course of the towing operation.

2. Whether, if so interpreted, the clause is opposed to sound public policy, and hence invalid.

STATEMENT

On April 6, 1944, the S. S. CHRISTOPHER GALE, a merchant ship owned by the United States, was being docked at Pier 1, Bush Docks, in Brooklyn. The ship was light, but under its own power, and had the assistance of two tugs, the DAUNTLESS # 6 and the DAUNTLESS # 9. Entry into the slip was attempted despite a strong wind and tide from starboard, and the ship sagged down to port, notwithstanding the dropping of a starboard anchor

and the efforts of the tugs, which were positioned on the port bow and quarter. The DAUNTLESS # 6 was caught between the ship and the pier and suffered severe damage. (R. 165-167, 169-170.)

Respondents, the Dauntless Towing Line, owners of the tug, brought a libel against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, to recover for this damage (R. 4-9). The issue was tried on the question of liability alone, and the trial court found that the accident was caused solely through the negligence of the docking pilot of the CHRISTOPHER GALE—who directed the movements of both ship and tugs—in attempting to enter the slip "after he knew or should have known that he could not overcome the force of the wind and tide" (R. 170). This pilot was in the general employ of Dauntless Towing Line, owner and operator of DAUNTLESS # 6 (R. 75, 166, 171).

Luckenbach Steamship Company, the general agent of the United States as owner of the CHRISTOPHER GALE, had arranged for the towage (R. 165, 170), and was aware that the terms of the Dauntless Line included the form of "pilotage clause" in common use about New York harbor (R. 165-167, 170). This clause provided (R. 167):

> When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat cap-

> tain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be liable for any damage resulting therefrom.

Respondents urged that this clause made the United States liable for the damage to the tug, even though the negligent pilot was in the respondents' general employ. The United States argued, on the other hand, that as the clause provided only that the tug-owners should not be "liable for any damage," it was not intended to require the tow to indemnify the tug owners for loss suffered through the negligence of their own employees, and further that if it were so intended it offended public policy and was void. The trial court rejected these contentions and ordered recovery against the United States (R. 167-168, 171).[1] The Court of Appeals for the Second Circuit affirmed on the opinion below (R. 185).

REASONS FOR GRANTING THE WRIT

Together with *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70, this case presents the Court with an

[1] A libel against Luckenbach Steamship Company as "charterer and/or agent" was dismissed on the authority of *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783.

unusual opportunity to clarify, in their major aspects, the now uncertain rules governing the common clauses by which tugs seek to relieve themselves of responsibility for damage occurring in a towing operation. Authoritative rulings by this Court will go far to settle this phase of admiralty law which has long been both an irritant and a source of continuing litigation.

1. Clauses relieving towing companies from the consequences of negligence for which they would otherwise be responsible are a normal part of towage contracts.[2] Precise information is not available on the extent to which the various forms of the clauses are found in such contracts in the different localities, but the litigation which has followed upon their use provides some gauge of their substantial uniformity and their well nigh universal use. There are now pending in this Court petitions for writs of certiorari in two other cases involving similar exculpatory clauses: *Bisso* v. *Inland Waterways Corp.*, No. 50, and *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70. These cases arose from casualties on the Mississippi River,[3] and off the coast of New England, respectively, and similar clauses have been involved in cases from

[2] The liability and responsibility of the respondents for the acts of the docking pilot, in the absence of the disputed "pilotage clause", is clear. *Sturgis* v. *Boyer*, 24 How. 110; *The West Eldara*, 104 F. 2d 670 (C.A. 2).

[3] An *amici* brief was filed with the Fifth Circuit in the *Bisso* case by counsel for eight companies operating harbor or river tugs on the Mississippi River and at New Orleans and Mobile, all of which companies use contracts containing exculpatory clauses.

the Great Lakes (*Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543 (C.A. 6)), the southern Atlantic coast (*Calzavaro* v. *Planet Steamship Corp.*, 31 F. 2d 885 (C.A. 4)), and the Pacific (*Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C.A. 9), affirmed, 259 U. S. 1). The district court below found that the challenged clause was "in common use in and around the New York harbor" (R. 167), the most important port in the nation. Moreover, exculpatory provisions of this general nature have appeared in towing contracts for at least eighty years. *The Syracuse*, 12 Wall. 167.

Yet the effect and validity of these provisions—questions of manifest importance to the entire maritime industry—are still uncertain and unclear, a constant source of litigation, a bar to settlements, and an unsettling factor in an important area of the maritime economy. And the confusion has come about largely because the position of this Court, expressed in three opinions, has been given conflicting interpretations ever since the issue first was discussed. It is for that reason that clarification of the issue is a task which only this Court can effectively perform.

In *The Syracuse*, 12 Wall. 167, the Court first encountered the problem when confronted with a contract which provided that a vessel was towed "at the risk of her master and owners." The Court declared (12 Wall. at 171):

> * * * if it be true * * * that, by special agreement, the canal-boat was being towed at

> her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences.

In the next fifty-eight years, disputes arose over whether the Court had found the exculpatory provision in violation of public policy or simply inapplicable when the tug was negligent. The Ninth Circuit twice held that the decision invalidated any attempt by a towing vessel to contract against its own negligence. *Alaska Commercial Co.* v. *Williams*, 128 Fed. 362; *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, affirmed on other grounds, 259 U. S. 1. The Second Circuit twice held cognate clauses valid when their intention to absolve was clearly stated. *The Oceanica*, 170 Fed. 893, certiorari denied, 215 U. S. 599; *Ten Eyck* v. *Director General of Railroads*, 267 Fed. 974; see also *Winslow* v. *Thompson*, 134 Fed. 546, 551 (C.A. 1); *The Pacific Maru*, 8 F. 2d 166, 171 (S.D. Ga.).

In 1928, this Court again took up the question in *Compania de Navegacion Interior* v. *Fireman's Fund Insurance Company*, 277 U. S. 66, commonly known as *The Wash Gray*. That towage contract

provided that except for the hawser, "all other risk and expense" were "to be borne by" the tow, and that the towing vessel "is not responsible in any way for loss or damage to" the tow (277 U. S. at 73). At issue was the liability to the tow of its insurers who had stipulated that the policy was to be null and void to the extent that the tow had released any right of recovery against a third party. The exculpatory clause was claimed as such a release. Citing with approval that part of *The Syracuse* which we have quoted above, the Court held that the clause did not release the owners of the towing vessel from claims due to the negligence of its master and crew (p. 73) and said (p. 74), "In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy."

But the question whether a towing vessel may transfer its responsibility for negligence was not yet clearly decided. Expressing doubt that *The Wash Gray* had overruled its decisions in *The Oceanica* and *Ten Eyck* v. *Director General of Railroads* (*supra*, p. 7), the Second Circuit, in *Sun Oil Company* v. *Dalzell Towing Company*, 55 F. 2d 63, without deciding the question, upheld a clause which provided:

> When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of

> the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.

This Court affirmed, 287 U. S. 291, declaring that (at p. 294):

> There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence.

But the opinion also goes on to take special note of the particular circumstances of the case—the grounding occurring in open channel while the tugboat captain was acting as pilot but with the ship entirely unaided by the tugs (287 U. S. at 294):

> Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage.[4]

Since the *Sun Oil* decision, the lower courts have, by and large, upheld exculpatory provisions without reference to distinctions between the type of clause appearing in *The Syracuse* and *The Wash*

[4] Respondents' employee in the instant case was directing the docking of the CHRISTOPHER GALE with the assistance of tugs, and thus was engaged in exactly that service which the respondents undertook to perform.

Gray and that in *Sun Oil*. See *Bisso* v. *Inland Waterways Corporation*, 211 F. 2d 401 (C.A. 5), pending on petition for a writ of certiorari, No. 50, this Term; *Boston Metals Co.* v. *S. S. Winding Gulf*, 209 F. 2d 410 (C.A. 4), pending on petition for a writ of certiorari, No. 70, this Term; *The Primrose*, 3 F. Supp. 267 (E.D. N.Y.); *The John J. Feeney*, 3 F. Supp. 270 (E.D. NY); *The Melvin and Mary*, 23 F. Supp. 398 (E.D. N.Y.); *The Francis Killian, Jr.*, 26 F. Supp. 323 (E.D.N.Y.); *contra: Petterson Lighterage & Towing Corp.* v. *The J. Raymond Russell*, 87 F. Supp. 467 (S.D. N.Y.). On the other hand, the Sixth Circuit, while not directly presented with the question, has indicated its belief that *Sun Oil* was intended to be limited to the situation where the sole motive power was that of the vessel, and the towing company's employee was acting solely as a pilot. *Great Lakes Towing Company* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543. And, further, the two earlier decisions of the Ninth Circuit have never been erased.

The condition of the law, then, is such that of perhaps the two foremost treatises in the field of admiralty one states that the release from negligence is valid, 1 Benedict, *Admiralty*, § 100 (6th Ed. 1941), and the other states that it is not, Robinson, *Admiralty*, 664, 672 (1939).

2. An especially grave doubt attaches to the validity of the "pilotage clause" in this case as it was applied by the courts below. For it was held not only to preclude recovery against the towing company for the negligent acts of its employees,

but to require indemnity from the tow for injuries sustained by the tugs through those same acts. In *The Syracuse* this Court declared that "the policy of the law * * * does require on the part of the person engaged in [the towing vessel's] management, the exercise of reasonable care, caution, and maritime skill * * *." 12 Wall. at 171. It may not be incompatible with this declaration to permit the tow to bear its own risks in a necessarily hazardous operation without recourse against the tug, for the tug must always be looking to its own safety. But if there is any validity in the interpretation given *The Syracuse* by the Ninth Circuit in the *Alaska Commercial Company* and *Mylroie* cases (*supra*, p. 7),[5] the protection of the *Sun Oil* decision cannot be extended to relieve the tug, not only of all liability, but of all risk even to itself. Such an application, moreover, places the tugboat captain or pilot, when testifying, in a position of conflicting interest which the courts should be loathe to encourage.

3. Even if the towing company may validly transfer all of its responsibility to its tows, it seems

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[5] Cf. Judge Coxe dissenting in *The Oceanica*, 170 Fed. 893, 896 (C.A. 2):

> The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it.

clear that it has not done so here by a clause which provides that neither the company nor its vessels "shall be *liable* for any damage resulting" from the acts of its captains or licensed pilots aboard a tow (emphasis added). This clause does not say that the company shall be saved harmless or free from any loss; it provides only that the company shall be free from liability. What was promised by the tow was indemnity, but the obligation to indemnify can arise only when the indemnitee is under a legal obligation to make payment for its wrong. *The Toledo*, 122 F. 2d 255 (C.A. 2), certiorari denied, 314 U. S. 689. Respondents, as indemnitees, could not be "liable" to themselves and were therefore not entitled to indemnity.

This reading of the words of the provision is reinforced by the accepted guides for applying exculpatory clauses. This Court and others have consistently held that even when a party may validly shift the risks of his negligence to another the contract must be strictly construed against him, and have declared that unless the provisions clearly and unequivocally announce such a purpose they shall not be given that meaning. *Noonan* v. *Bradley*, 9 Wall. 394, 407; *Mostyn* v. *Delaware, L. and W. R. R. Co.*, 160 F. 2d 15, 19 (C.A. 2); *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36.[6] Indeed, if *The Syracuse* and *The Wash Gray* (*supra*, pp. 6-8) did not declare invalid attempts by tugs to divest themselves of responsibility, they can

[6] The clause here should further be strictly construed against the respondents, who were its draftsmen. *Insurance Co.* v. *Slaughter*, 12 Wall. 404.

only be explained as illustrations of the most rigid application of this canon to towage contracts. See also *The Devonshire and St. Winifred*, [1913] P. 13, refusing to hold a tow liable to the tug under a contract similar to that in the instant case.[7]

CONCLUSION

We pointed out in our memorandum in *Bisso* v. *Inland Waterways Corp.*, No. 50, that the three "pilotage clause" cases which will be before the Court present the issues of the validity and effect of these provisions in actions (1) by the tow against the tug (the *Bisso* case), (2) by a third party against the tow (*Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70), and (3) by the tug against the tow (the instant case). The Court thus has the opportunity to render at this term definitive rulings in the three situations which form the great bulk of those involving the widely used "pilotage clause".

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

JULY, 1954.

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[7] *The Syracuse* and *The Wash Gray* indicate that this Court, charged in such large measure with the administration of admiralty law, has always been ready to assume jurisdiction over questions of contract interpretation, when elements of confusion and uncertainty have clouded common or standard contract provisions. See, also, *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 428.

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